



# HAWAI‘I CIVIL RIGHTS COMMISSION

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April 2, 2015  
Rm. 325, 2:00 p.m.

To: The Honorable Karl Rhoads, Chair  
and Members of the House Committee on Judiciary

From: Linda Hamilton Krieger, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 1291, S.D.2, H.D.1

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services. The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

S.B. No. 1291, S.D.2, H.D.1, if enacted, would provide protections for qualifying medical marijuana patients and primary caregivers, including protections from: refusal to enroll or other penalty by a school; refusal to lease or other penalty by a landlord; disqualification from medical care; and denial of custody, visitation, or parenting time .

The HCRC supports S.B. No. 1291, S.D.2, H.D.1, with a suggestion that the legislature should amend Section 1 of the bill to include an express statement that an individual with a disability who is a qualifying medical marijuana patient has the right to request a reasonable accommodation from an employer for the use of medical marijuana, if the individual with a disability would be subject to termination or other adverse action for violation of a workplace drug policy based on a positive drug test.

In its original form, S.B. No.1291 was intended to protect the employment rights of qualifying medical marijuana patients who test positive for marijuana use, by adding identical statutory language to a new subsection to HRS § 329-125 and a new section in HCRC chapter 378. At hearing before the Senate Committee on Judiciary and Labor, the HCRC testified that it was not necessary or appropriate to repeat the new statutory language in HRS chapter

378, emphasizing that the HCRC's interest in S.B. No. 1291 was focused on the right of a person with a disability to request a reasonable accommodation in employment. It was not, the HCRC urged, appropriate or desirable to assign the HCRC enforcement jurisdiction over a broader protection for all medical marijuana users, not limited to persons with disabilities.

The Senate Committee on Judiciary and Labor acknowledged the need to provide some civil protections for medical marijuana users from employment ramifications, but amended the bill to limit the newly established protections for qualifying medical marijuana users to prohibit discrimination by schools and landlords, in medical care, and in child custody, visitation, or parenting time issues.

The HCRC suggests that if the legislature chooses to establish the right to request a reasonable accommodation for an individual with a disability who is a qualifying medical marijuana patient, and who has tested positive for marijuana use in a drug test, it can do so by adding express language to that effect in Section 1 of the H.D.1 of the bill, with corresponding comments in the committee report. Suggested language is attached to this testimony.

#### **Current Medical Marijuana Statute – No Protection for Medical Marijuana Patients in Employment**

Hawai'i, like a number of other states, has enacted its medical marijuana law, HRS chapter 329, permitting physicians to prescribe marijuana for medical purposes for qualifying patients who have been diagnosed as having a debilitating medical condition. The statute allows qualifying patients who have a physician's certification and have registered with the Department of Health to obtain, cultivate, possess, and use marijuana to alleviate the symptoms or effects of a debilitating medical condition.

HRS § 329-125 provides protections for qualifying patients and primary caregivers of qualifying patients, including the qualifying medical use of marijuana as an affirmative defense to any criminal prosecution involving marijuana. Chapter 329 currently provides no employment protections for medical marijuana users.

**The Hawai'i medical marijuana law does not provide protection for marijuana use or intoxication at work.** Indeed, no state medical marijuana law goes that far, and neither would any new protection created by recognizing a right of qualifying medical marijuana patient who is an individual with a disability to request a reasonable accommodation.

HRS § 329-121 defines "debilitating medical condition" to mean three things: 1. Cancer, glaucoma, HIV positive status, AIDS, or the treatment of those conditions; 2. A chronic or debilitating disease or medical condition or

its treatment that produces cachexia or wasting syndrome, severe pain, severe nausea, seizures (including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of MS or Crohn's disease; or 3. Any other medical condition approved by the Department of Health pursuant to its rules, pursuant to a request from a physician or a potentially qualifying patient.

### **Federal and State Law Protections for Persons with Disabilities in Employment – Treatment of Medical Marijuana Users**

Both the federal Americans with Disabilities Act and state HRS Chapter 378, part I, prohibit discrimination based on disability in employment, and require an employer provide reasonable accommodation to the known physical or mental limitations of an employee with a disability, unless the employer can show that the accommodation would impose an undue hardship on the business. A reasonable accommodation is any modification or adjustment that makes it possible for a person with a disability to enjoy equal employment opportunity.

Reasonable accommodations might include: making existing facilities accessible; job restructuring; part-time or modified work schedules; acquiring or modifying equipment; **changing** tests, training materials, or **policies**; providing qualified readers or interpreters; or reassignment to a vacant position.

Under both federal and state law, in the reasonable accommodation context, a person with a “disability” means a person who has a physical or mental impairment which substantially limits one or more major life activities. Major life activities include: 1. Basic activities that most people in the general population can perform with little or no difficulty, including, but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, sitting, standing, lifting, reaching, eating, sleeping, bending, concentrating, thinking, communicating, interacting with others, and working; the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genito-urinary, bowel, bladder, neurological, brain respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, including the operation of an individual organ in the body.

The Ninth Circuit Court of Appeals has held that **the federal ADA does not protect individuals who use marijuana for medical use or require employer accommodation of such use**, because the ADA expressly excludes current users of illegal drugs from its definition of “qualified individuals with a disability,” and marijuana remains an illegal drug under federal law, even when such use is legal under state law. *James v. Costa Mesa*, 700 F.3d 394, 397 (9<sup>th</sup> Cir. 2012).

In addition there are federal drug-free workplace laws that apply to federal contractors and, in the transportation industry, U.S. Department of Transportation (DOT) regulations that employees in safety sensitive positions, such as truck drivers, must be removed from those positions if they test positive for drugs, until certain return-to-duty requirements are met. Non-compliance with these DOT regulations can result in fines and loss of federal funding. Some state medical marijuana statutes expressly permit the discipline of a qualifying patient for violating a workplace drug policy or failing a drug test where that failure would place the employer in violation of federal law or cause the employer to lose a federal contract or funding.

While there is an apparent conflict between federal and state laws, it is worth noting that no court has ruled that federal law preempts the Hawai‘i state medical marijuana law. And, our state laws can provide broader and stronger protections than the federal law.

Which brings us to the question: ***Under Hawai‘i disability law, must an employer consider and provide a reasonable accommodation for an employee with a disability who is a medical marijuana user by making an exception to a policy imposing discipline for a positive marijuana drug test?***

Under current law, the answer is likely no. We have found no jurisdiction that has a medical marijuana law that requires employers to make a reasonable accommodation for use of medical marijuana for persons with disabilities, without express inclusion of employment-related protections in their medical marijuana statutes.

Based on cursory research, of some twenty-four states that have medical marijuana laws, it appears that five state statutes include protections for employees: Delaware, Arizona, Maine, Rhode Island, and Nevada. The Delaware and Arizona statutes expressly protect employees who are registered medical marijuana users from discriminatory action in hiring, termination, terms and conditions, or other penalty based on a positive drug test. Nevada requires employers to make reasonable accommodations for an employee who is a registered medical marijuana user.

Hawai‘i could follow suit with the enactment of an amended S.B. No. 1291, requiring employers to consider and provide a reasonable accommodation for a person with a disability who tests positive for marijuana, if that person is a registered qualifying medical marijuana patient.

It is important to note that the HRS § 329-121 definition of “debilitating medical condition” is not identical to the HRS § 378-1 and HAR 12-46-182 definition of “disability,” so not every registered qualifying medical marijuana patient will necessarily be a person with a disability entitled to a reasonable accommodation.

## **CONCLUSION**

The HCRC's interest in S.B. No. 1291, S.D.2, H.D.1, is focused on whether and how the bill affects the right of a person with a disability to a reasonable accommodation in employment; in its current form, H.D.1 does not address the HCRC concern. The Committee can address the HCRC concern by amending Section 1 of the H.D.1, to expressly protect the rights of individuals with disabilities who are registered medical marijuana users, confirming a state reasonable accommodation requirement. The HCRC continues to caution that it is neither appropriate or desirable to assign the HCRC enforcement jurisdiction over a broader protection for all medical marijuana users, not limited to persons with disabilities, for wrongful termination, unlawful suspension, discharge, or discriminatory action, as was the case with earlier drafts of this bill, especially in light of the HCRC's limited resources and lost capacity to enforce civil rights protections already under HCRC jurisdiction.

With these comments and suggestions, the HCRC supports S.B. No. 1291, S.D.2, H.D.1.

Suggested language to effect the right to reasonable accommodation for persons with a disability who are qualifying medical marijuana users:

SECTION 1. The legislature finds that support for the medical use of marijuana in the State is strong and that the experience of the State with the medical use of marijuana has been favorable, but that existing protections for patients are very weak regarding civil penalties. Patients within the medical marijuana program should not be less secure in their housing, school enrollment, or supplemental medical care than patients who have made different private decisions with their doctors concerning medication or treatment.

The legislature recognizes and confirms that individuals with disabilities who are qualified medical marijuana patients have the right request reasonable accommodation in employment if they test positive for the use of marijuana, except that reasonable accommodation does not include marijuana use or intoxication at work.

The legislature is mindful of the difficult position of medical marijuana patients under federal law and seeks to ensure that the rights of patients are protected, while at the same time respecting the needs of institutions and individuals to protect themselves from federal penalties. For this reason, the rights afforded under this Act are limited to those situations in which no monetary or licensing-related benefit would be revoked for compliance with state law, and to those situations in which patients and caregivers are in strict compliance with the State's medical marijuana law.

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON JUDICIARY

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy Sanbuenaventura

Thursday, April 2, 2015

2:00 p.m.

Room 325

### SUPPORT for SB 1291 SD2, HD1 - Prohibiting Discrimination Of Medical Marijuana Patients

Aloha Chair Rhoads, Vice Chair Sanbuenaventura and Members of the Committees!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered always mindful that 6,000 Hawai'i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 1292 SD2 prohibits discrimination against medical marijuana patients and caregivers by schools, landlords, and courts with regard to medical care or parental rights.

The HD1 version is cause for privacy concerns. When the program was part of the Law Enforcement Division of the Department of Public Safety, the medical marijuana records were released to a news outlet. No sanctions were issued for this HIPPA violation. We trust that DOH will handle these records with the utmost confidentiality and with the patients best interests at heart.

Act 228, Hawai'i's Medical Marijuana Law passed 15 years ago permitted patients to use medical cannabis to help relieve their suffering, but left patients on their own regarding access to their medicine and protection against discrimination.

Community Alliance on Prisons supports this bill that contains language that is already enacted in other states, such as Arizona.

Community Alliance on Prisons respectfully asks the committee to support our patients by prohibiting discrimination in education, housing, protection against being denied custody of children, and protection against being denied other medical care, such as organ transplants, on the grounds of being a medical cannabis patient.

Mahalo for this opportunity to testify.



Committee: Committee on Judiciary  
Hearing Date/Time: Thursday, April 2, 2015, 2:00 p.m.  
Place: Room 325  
Re: Testimony of the ACLU of Hawaii in **Support of S.B. 1291, S.D. 2, H.D. 1**, Relating to Medical Marijuana

Dear Chair Rhoads and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in **support of S.B. 1291, S.D. 2, H.D. 1**, which provides protections for individuals who are medical marijuana patients.

Patients who are obeying the law should not face discrimination with regard to medical care, school enrollment, housing, or parental rights. Being a medical cannabis patient should not disqualify individuals from services, benefits, or rights that would otherwise apply.

Thank you for this opportunity to testify.

Lois K. Perrin  
Of Counsel  
ACLU of Hawaii

*The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for 50 years.*

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Chair Belatti, Chair Rhoads, and Committee Members  
February 7, 2015  
Page 2 of 2

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<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Tom Berg	Norml Hawaii Chapter	Support	Yes

Comments: The bill is a good start in the right direction. The overall and preferred classification of the cannabis plant however should be one whereby the plant is available to any adult that seeks such relief and all prohibitions lifted for adults to consume the plant as they deem fit. Mahalo Tom Berg Executive Director Norml Hawaii Chapter



*Hawaii's voice for sensible, compassionate, and just drug policy*

## **COMMITTEE ON JUDICIARY**

Rep. Karl Rhoads, Chair. Rep. Joy A. San Buenaventura, Vice Chair

Thursday, April 2, 2015, 2:00 p.m.

Conference Room 329

State Capitol

415 South Beretania Street

### **Executive Director Rafael Kennedy in support – SB1291 – Relating to the Medical Use of Marijuana**

Aloha Chair Rhoads, Vice Chair San Buenaventura, and members of the committee,

Mahalo for taking the time to hear this bill. As you may know, Hawaii's medical marijuana law allows patients to have and use medical cannabis, but it does not give them any real protection against civil liability or discrimination, and in this way it is sorely behind the times. Most recent medical cannabis programs include some protections against the civil penalties and discrimination that can be as harmful as criminal prosecution for patients.<sup>1</sup>

- Patients can still be denied housing, despite recent improvements to housing protections for patients. Especially in Hawaii, housing is a core issue, both for individuals and families.
- Patients can be denied visitation with their children solely on the grounds of their legal medication. Fears about losing custody, losing parenting time, and losing the chance to play a role in the lives of children are critical for many people, and we hear often from patients who are worried about neighbors threatening to call Child Protective Services. The fact is that many medical cannabis patients are excellent parents, and their status alone should not be enough to cause them to lose their children.
- Patients can be expelled from school, or denied admission to educational programs.
- Patients can be denied life-saving transplants solely on the grounds of their medical cannabis use and have been! There have been many incidents of this throughout the country, including a Big Island resident named Kimberley Reyes who lost her life to hepatitis after

<sup>1</sup> See the attached document from the Marijuana Policy Project outlining the state of civil protections for medical cannabis patients in various states.

being denied a liver transplant in 2009 because of having cannabis in her system.<sup>2 3</sup> This is truly unconscionable. In many cases, medical cannabis is used precisely because it is not hepatotoxic.

This bill may not fix all of these problems immediately, because it allows exceptions for institutions that would lose "a monetary- or licensing-related benefit under federal law or regulation." Still, this shows the clear intent to treat medical cannabis patients with the same compassion and humanity with which we treat patients who use other medicine.

This bill does contain a provision that may be problematic, page 2 lines 15-17 read: *"provided further that the department of health may allow a school or landlord limited access to the medical marijuana registry."* While there may be a valid reason to allow these institutions to verify that someone claiming to be a patient is indeed a patient registered with the department of Health, the mechanism for doing so is for the patient to present the school or landlord with their registry card. The role of the department in this interaction should be limited to verifying, when given all information contained in a registry card, that this card is valid. Schools and landlords **should not have any direct access to the registry database**. To that end, this provision might be amended to read:

*"provided that the department of health may respond to a formal request from a school or landlord to verify that the credentials presented on a specific medical marijuana registry card are valid."*

Mahalo for the opportunity to speak about this issue, and for your time and consideration.

Rafael Kennedy  
Executive Director,  
Drug Policy Forum of Hawaii

The Drug Policy Forum of Hawaii works to educate policymakers and the public about effective ways of addressing drug issues in Hawai'i with sensible and humane policies that reduce harm, expand treatment options, and adopt evidence-based practices while optimizing the use of scarce resources.

2 Chelsea Jensen. "Marijuana Use May Have Cost Big Island Woman a Life-Saving Liver Transplant." *Honolulu Advertiser*. August 9, 2009.  
<http://the.honoluluadvertiser.com/article/2009/Aug/09/br/hawaii308090006.html>.

3 Belville, Russel. "The Denial of Organ Transplants to Medical Marijuana Patients." *The Huffington Post*. Accessed February 16, 2015.  
[http://www.huffingtonpost.com/russ-belville/the-denial-of-organ-trans\\_b\\_435348.html](http://www.huffingtonpost.com/russ-belville/the-denial-of-organ-trans_b_435348.html).

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Sara Steiner	Individual	Support	No

Comments: Dear Chair Rhoads, Vice Chair San Buenaventura and member of the committee, I am a 53 year old medical cannabis patient on the Big Island. I absolutely support this bill. I notice you see it, but you could make it better by removing the clause which allows for discrimination by blaming compliance with the federal government's archaic marijuana laws. I guess that's how the feds and law enforcement keep Hawaii legislators under their thumb as regards cannabis law, by fear of losing federal reserve notes, or threat of stoned hippies running rampant in our communities. Please pass this bill and give it an immediate effective date!

SB1291 SD2 HD1

POSITION: STRONG SUPPORT

Chairmen Rhodes, Vice Chair San Buenaventura and members of the House Judiciary Committee.

Thank you for this opportunity to provide personal testimony in strong support of SB1291 relating to the protection for medical marijuana patients.

My name is Jari Sugano of Mililani, Oahu. I am also the mother and caregiver of a 6 year old girl name Maile Jen Kaneshiro who qualifies and utilizes medical cannabis for her qualifying medical condition.

Reckless use of cannabis has greatly jeopardized the advancement of Hawaii's medical marijuana program and penalizing of patients who operate within the boundary of the state's recognized medical marijuana program. Despite having a qualifying medical condition to warrant the use of cannabis, patients are discriminated against in education, job selection, housing, medical care and the custody and visitation rights of their children.

Please ensure civil protections are in place to protect cannabis patients against unnecessary discrimination.

Thank you for the opportunity to express my support of SB1291.

Submitted By	Organization	Testifier Position	Present at Hearing
stuart saito	Individual	Support	No

Comments:

Submitted By	Organization	Testifier Position	Present at Hearing
Andrea Tischler	Americans for Safe Access Big Island Chapter	Support	No

Comments: Comments: Big Island Americans for Safe Access consider this bill extremely important. Certified medical cannabis patients require protections against housing discrimination or in being denied visitation and custody of children, in hiring, education and medical care and organ transplants. These rights are guaranteed in most states which have medical cannabis laws.



**To:** COMMITTEE ON JUDICIARY

Rep. Karl Rhoads, Chair, Rep. Joy A. San Buenaventura, Vice Chair

**From:** Wendy Gibson R.N.

**RE: Support – SB1291** (SD2, HD1) Relating to Medical Marijuana

Hearing DATE: Thursday, April 02, 2015. TIME: 2:00 p.m.

PLACE: Conference Room 325 State Capitol- 415 South Beretania Street

—

Dear Senate Chair Rhoads, Vice Chair San Buenaventura and members of the committee,

Using cannabis as private medical decision made between the patient and doctor. Unfortunately medical cannabis patients face discrimination in many realms.

This bill would protect medical cannabis patients from discrimination by schools, landlords, and the courts with regard to financial matters, housing, medical care or parental rights. Passing SB1291 will help rectify some of these problems. Other states have successfully instituted similar protective legislation.

Thank you for your consideration,

Wendy Gibson R.N.

Submitted By	Organization	Testifier Position	Present at Hearing
Fern Mossman	Individual	Oppose	No

Comments: What protections are in place for landlords not to have to smell the pot weed/ skunk weed ect. being smoked in their rental? While the ones imbibing get relief, it causes stress in others (Personal testimony excluded for privacy issues). This law will only protect landlords from financial loss (as seen below), but it does not address the emotional trauma imposed on neighbors. ~329- Medical marijuana patient and caregiver protections. (a) No school shall refuse to enroll or otherwise penalize, and no landlord shall refuse to lease property to or otherwise penalize, a person solely for the person's status as a qualifying patient or primary caregiver in the medical marijuana program under this part, unless failing to do so would cause the school or landlord to lose a monetary or licensing-related benefit under federal law or regulation; Favoring one group over another is not right. What about the smoking in the schools? If the effects only last or 4 hours and the medical user is in school for longer how will the next dose be give? Will you please put safeguards in that will protect the other students from secondary smoke. Maybe only permit the losengers in school.

Dr. Myron Berney, ND Lac

908 16<sup>th</sup> Ave, Honolulu, HI 96816-4126

SB1291 SD2 HD1

**LATE**

## **I am happy to announce that FEDERAL LAW HAS CHANGED**

In December 2014 Congress passed legislation, signed by the President, which cuts off all funds for the Department of Justice to go against or hamper in any way State Medical Marijuana Laws.

This new Federal Legislation protects both:

1. The State Law authorizing the Medical Use of Marijuana, HRS 329 Part IX, and thereby also
2. Recognizes and protects the Medical Use of Marijuana in the various States, and

The immediate result of the recognition and protection of the Medical Use of Marijuana in the various States is that this bumps marijuana out of DEA Schedule 1 which requires that controlled substances in Schedule 1 have no medical use. Congress has failed to re-schedule Medical Marijuana meaning that it is unscheduled under Federal Law.

Hawaii State Controlled Substance Act is tied directly to the Federal Controlled Substance Act. Modernization to the Federal Law is supposed to trickle down to the State and guide the Legislative process.

Under current Hawaii State Law which is now Federally recognized and protected, Medical Marijuana is a necessary, essential, medically appropriate and reasonably safe non-prescription herbal medicine.

**I support this bill that specifically provides civil rights protection to seriously ill patients especially now with the changes in Federal Law and policy.**

The State of Hawaii which was a leader in stepping forward on the Medical Use of Marijuana under Part IX of the Controlled Substance Act, HRS 329, is now **LAGGING FAR BEHIND FEDERAL LAW AND FEDERAL POLICY.**

The same Federal regulations and guidelines that permit the Commercial Sales of Recreational Marijuana for the State of Colorado and Washington State are universally applicable to all 50 States including the State of Hawaii.

The Federal Justice Department opposes the current Marijuana Prohibition stating that it is not constitutional. Justice prefers reasonable regulations for the legitimate commercial sales of recreational marijuana to “CAPTURE THE REVENUE STREAM from the black market that steals revenues from government coffers.”

Justice wants changes in the banking laws that prohibit legitimate Marijuana Businesses from having a commercial Bank Account. Banking prohibitions force the Marijuana Industry to be run as a CASH business which increases theft of these cash resources and a lack of banking accountability for taxation revenues.

Justice wants to reduce the mandatory minimal sentencing guidelines for Marijuana.

Again...

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The immediate result of the recognition and protection of the Medical Use of Marijuana in the various States is that this bumps marijuana out of DEA Schedule 1 which requires that controlled substances in Schedule 1 have no medical use.

Hawaii State Controlled Substance Act is tied directly to the Federal Controlled Substance Act. Modernization to the Federal Law is supposed to trickle down to the State and guide the Legislative process.

Current Law already protects patients with medical disabilities from discrimination. With the ever changing face of Federal and State Laws, with the Federal Government and States moving towards full legalization of both medical and recreational marijuana, protecting seriously ill patients from unlawful discrimination is appropriate and essential.

Submitted By	Organization	Testified Position
Robert Bacher	Green Futures	Supportive

**LATE**

Comments: This bill will help reassure parents who would like to choose safer medicine, but are worried about possible custody issues. A parent who copes with their illness or ailment with medical cannabis can be more alert and function than some pharmaceutical prescriptions like opioids. If opioids are necessary, studies have shown cannabis to help decrease their use.